Nos. 83-2030

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE BOARD OF EDUCATION OF THE CITY OF OKLAHOMA CITY, STATE OF OKLAHOMA,
Appellant,

v.

THE NATIONAL GAY TASK FORCE,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF AMICUS CURIAE IN SUPPORT OF APPELLANTS

CONCERNED WOMEN FOR AMERICA EDUCATION AND LEGAL DEFENSE FOUNDATION

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QUESTIONS DISCUSSED

Did the Tenth Circuit use the correct standard to judge the free speech rights of public school teachers?

Did the Tenth Circuit properly construe 70 Oklahoma Statute 6-103.15?

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I

THE TENTH CIRCUIT FAILED TO FOLLOW THIS COURT'S DECISIONS CONCERNING FREE SPEECH RIGHTS OF PUBLIC SCHOOL TEACHERS

The Tenth Circuit declared unconstitutional a portion of 70 Okla. Stat. §6-103.15, the law that allows public school teachers to be fired for engaging in "public homosexual conduct," which is defined in the statute as, "advocating, soliciting, imposing, encouraging or promoting public or private homosexual activity in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employees." *Na-*

tional Gay Task Force v. *Board of Education,* 727 F.2d 1270 (10th Cir. 1984.) The statute then gives four standards by which to judge whether the teacher's behavior renders the teacher unfit for teaching children in public schools.

The Tenth Circuit invalided this section of the law by relying on the standards spelled out in *Brandenburg* v. *Ohio,* 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969). We would submit that the Tenth Circuit's reliance on *Brandenburg* is misplaced. The case which should have controlled their decision is *Pickering* v. *Board of Education,* 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). Although the Tenth Circuit referred to *Pickering,* their analysis of the Oklahoma statute was made with little regard to the principles of *Pickering,* and with almost total reliance on the "imminent lawless action" test of *Brandenburg.*

The Tenth Circuit said:

> The First Amendment protects 'advocacy' even of illegal conduct except when 'advocacy' is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action, *Brandenburg,* (citation omitted). The First Amendment does not permit someone to be punished for advocating illegal conduct at some indefinite future time, *Hess v. Indiana,* 414 U.S. 105, 109, 94 S.Ct. 326, 38 L.Ed.2d 303 (1973)."
>
> —729 F.2d at 1274.

The court of appeals noted the *Pickering* holding that the State has an interest in maintaining the efficiency of the educational process in public schools and therefore may in some ways limit the speech of public school teachers. The court noted:

> We recognize that a state has interests in regulating the speech of teachers that differ from its interests in regulating the speech of the general citizenry, *Pickering v. Bd. of Ed.,* (citation omitted). But a state's interests outweigh a teacher's interests only when the expression results in a material or substantial interference or disruption in the normal activities of the school. See *Tinker v. Des Moines Independent Community School District,* (citation omitted). This Court has held that a teacher's First Amendment rights may be restricted only if "the employer shows that some restriction is necessary to prevent the disruption of official functions or to insure effective performance by the employee." *Childers v. Independent School District No. 1,* 676 F.2d 1338, 1341 (10th Cir. 1982). Defendant has made no such showing.
>
> —729 F.2d at 1274

However, as we have noted, the Tenth Circuit's analysis of the Oklahoma statute gave little regard to *Pickering,* but placed almost total reliance on the "imminent lawless action" test of *Brandenburg.*

We would suggest that *Pickering* is the more relevant precedent to follow in this case for three principal reasons. First, *Pickering* involves the analysis of the free speech rights of teachers in their capacity as public employees, while *Brandenburg* involves the rights of the general public to freedom of speech. Second, in *Pickering* the party asserting free speech rights faced the potential loss of employment, while in *Brandenburg* the consequences were criminal prosecution for speech with the possibility of jail time. Third, in *Pickering* the teacher was dealing with the school system which, of course, deals with

children. In *Brandenburg* the speech was directed toward members of the general public.

Brandenburg concerned a group of Ku Klux Klan members who had met and advocated violence against blacks and other minority groups. The Klansmen had been charged with violating Ohio's criminal syndicalism statute. On the facts, *Pickering* parallels more closely the case at hand than does *Brandenburg*. Most importantly for this case, *Pickering* uses a different constitutional test than the one used in *Brandenburg*.

In *Pickering*, a public school teacher from Illinois was fired because he wrote a letter to the editor, that was published. The letter to the editor criticized the way the board of education and the school superintendent had handled past proposals to raise new revenue for the school system. The school board then acted to fire the teacher for writing this letter. The Supreme Court reversed the firing, saying that it violated the teacher's right to freedom of speech. In *Pickering*, the Supreme Court laid out the standards that limit a teacher's freedom of speech because of his employment as a public employee:

> The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern, and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."
>
> —391 U.S. at 568.

This Court said that a "balancing test" is the appropriate standard to use when examining the free speech rights of public school teachers, because the State has an interest in "promoting the efficiency of the public services it performs through its employees."

Pickering and not *Brandenburg* should control this Court's analysis of the Oklahoma law. The Tenth Circuit failed to note the factual similarities between *Pickering* and the case at hand, and the significant factual differences between *Brandenburg* and the case at hand.

First, the Oklahoma law deals with public school teachers, whom the government employs, so there is a legitimate government interest in the teacher's behavior, *Pickering*. The government has no interest in the views or behavior of Ku Klux Klan members, as in *Brandenburg*, unless they break the law. Klansmen are private citizens; teachers are employees of the state.

Also, the consequences to the individuals involved are different. A teacher who violates the Oklahoma law would lose his job. A Klansman (or anyone else) who violated the Ohio criminal syndicalism law would be convicted of a crime.

Of course, this Court should guard vigilantly against any impingement of free speech involving private citizens being subjected to criminal prosecution. But, when considering the free speech rights of public school teachers, this Court has said in *Pickering* that their interests must be balanced with the interests of the State in maintaining an efficiently run education system.

This means, this Court has said in essence, that the State may place limited restrictions on the speech of public school teachers. This conclusion is apparent from two lines of decisions by this Court that point to two countervailing interests that allow some restrictions on the speech of teachers: 1. Public school teachers are employed by the State, and 2. Children receive special protections which allow restrictions on the speech of others.

A.

Limits on Teachers' Speech Because They are Public Employees

Pickering and not *Brandenburg* applies to public school teachers, because public school teachers are employed by the State, and are therefore representatives of the State. This Court said in *Pickering* that a public employee has limitations placed on his free speech rights that could not be placed on others in the United States, because the public school teacher works for the state.

For example, an evangelist has the constitutional right to stand on a soapbox in a public city park and preach the Christian gospel to passersby, but a public school teacher does not have the right to preach the Christian gospel to his students in the classroom. Because the public school teacher is an agent of the state, he must have some limits on his speech, or else he will disrupt the educational process, or teach things that are unconstitutional for the state to teach, such as religion. This restricts the teacher's speech based on the content of the speech, but countervailing constitutional interests make such a restriction constitutionally acceptable. See *Abington School District v. Schempp*, 374 U.S. 203, 83 L.Ed. 2d 1560, 10 L.ED.2d 884 (1963).

The fact that the Supreme Court has intended for the *Pickering* "balancing test" to be used in a public school teacher context, and not a *Brandenburg* "imminent, lawless action" test, is apparent from several other decisions. In the recent case of *Connick v. Myers*, ____ U.S. ____, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983), the Court said:

> We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interests, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.
>
> —75 L.Ed at 720.

This Court further held in *Connick:*

> Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record.
>
> —*Id.*

This Court is not saying that the free speech rights of teachers dangle totally at the whim of the public employer. The Court is saying that if an employee speaks as an employee on personal matters, his speech is not necessarily protected, because it may be disruptive to the work place.

This Court expressed this principle in another case, saying that school officials may limit the free speech rights of students and teachers, if their speech may "materially and substantially interfere with the requirement of appropriate discipline in the operation of the school," *Tinker v. Des Moines Community School District*, 393 U.S. 503, 509, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969).

The Tenth Circuit cited both *Tinker* and *Pickering*, but the test they end up using is the test of *Brandenburg*. The Tenth Circuit simply did not give sufficient weight to the State's interest in maintaining the efficiency of the educational process offered in its schools.

Classroom disruption is not the only issue when a teacher stands as the representative of the state before the students in a public school classroom. The state has the power to teach shared community values, and the state is

forbidden to teach other values, such as ones that promote religion. In *Sheldon v. Tucker,* 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960), the Supreme Court said:

> The State can investigate the "competence and fitness" of public school teachers because "a teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live." [quoting *Adler v. Bd. of Ed.,* 342 U.S. 485, 493, 72 S.Ct. 380, 96 L.Ed. 517 (1952).] There is "no requirement in the Federal Constitution that a teacher's classroom conduct be the sole basis for determining his fitness. Fitness for teaching depends on a broad range of factors." [quoting *Beilan v. Bd. of Ed.,* 357 U.S. 399, 406, 78 S.Ct. 1317, 2 L.Ed.2d 1414, 1420 (1958)].
>
> —364 U.S. at 484.

In *Ambach v. Norwick,* 441 U.S. 68, 99 S.Ct. 1589, 60 L.Ed. 2d 49 (1979), the Supreme Court said:

> A State properly may regard all teachers as having an obligation to promote civic virtues and understanding in their classes, regardless of the subjects taught. Certainly a State may take account of a teacher's function as an example for students, which exists independently of particular classroom subjects.
>
> —441 U.S. at 80.

In the lower court decision of *Palmer v. Board of Ed. of the City of Chicago,* 466 F.Supp. 600 (N.D. Ill. S.D. 1979), the federal court said along these same lines:

> Further, the court recognizes the defendant school board has an "undoubted right" to regulate its curriculum *Epperson v. Arkansas,* 393 U.S. 97, 107, 89 S.Ctr. 266, 21 L.Ed.2d 228

> (1968). States acting through local school boards are possessed of power "to inculcate basic community values in students who may not be mature enough to deal with academic freedom as understood or practiced at higher education levels" *East Hartford Ed. Assn. v. Bd. of Ed.,* 562 F.2d 838, 843 (2nd Cir. 1977).
>
> —466 F.Supp. at 602-3.

In *Palmer* the school board fired a teacher who was a Jehovah Witness, who refused to lead her students in a flag salute and the Pledge of Allegiance, and would not teach about certain areas of American history. The school board was required by Illinois law to make sure that the teachers taught "patriotism" to the public school students. The teacher was fired, and the courts upheld the firing because her personal beliefs prevented her from teaching the public values mandated by law.

Oklahoma law also places similar restrictions on public school teachers' right to free speech. The statute, 70 Okla. Stat. §6-103, allows teachers to be fired for "immorality, willful neglect of duty, cruelty, incompetency, teaching disloyalty to the American Constitutional system of government, or any reason involving moral turpitude. . . ."

This demonstrates clearly that the courts have allowed some restrictions on the free speech rights of teachers because they are public employees.

B.

Limits on Public School Teachers' Speech Because They Deal with Children

The Supreme Court has granted special protections to children, because they are young, vulnerable and impressionable. These protections for children also act to limit the free speech rights of others.

In *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975), the Supreme Court expressed the need to protect children:

> It is well settled that a State or municipality can adopt more stringent controls on communicative materials available to youths than on those available to adults. See *Ginsberg v. N.Y.,* 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968).
>
> —422 U.S. at 212.

See also *New York v. Ferber,* 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982).

This Court implied that speech could be restricted in elementary and secondary public schools in a way that would be prohibited in colleges and universities. In *Widmar v. Vincent,* 454 U.S. 263, 102 S.Ct. 269,70 L.Ed.2d 440 (1981), this Court said in footnote 14:

> University students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion.
>
> —454 U.S. at 274.

The Tenth Circuit did not take these interests into account, and therefore, analyzed the Oklahoma law incorrectly, by using the "imminent lawless action" standard of

Brandenburg, rather than the balancing test of *Pickering.* The courts have allowed restrictions on a teacher's right to free speech in the past because public school teachers stand as the representative of the state, and they deal with children.

II

THE TENTH CIRCUIT'S CONSTRUCTION OF THE OKLAHOMA STATUTE IS STRAINED BEYOND ITS INTENT – PROPERLY CONSTRUED IT IS CLEARLY CONSTITUTIONAL

The Supreme Court has made this statement about facial attacks of overbreadth on statutes affecting speech:

> Application of the overbreadth doctrine in this manner, is, manifestly, strong medicine. It has been employed by the Court sparingly and only as a last resort. Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute.
>
> —*Broadrick v. Oklahoma,* 413 U.S. 601, 613, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973).

The Tenth Circuit in this case, in effect argues that it had no choice but to find the Oklahoma statute unconstitutionally overbroad on its face. The court said:

> A statute is saved from a challenge to its overbreadth only if it is "readily subject" to a narrowing construction. It is not within this Court's power to construe and narrow state statutes. *Grayned* v. *City of Rockford,* 408 U.S. 104, 110 (1972).
>
> —729 F.2d at 1275.

We would submit that the Tenth Circuit misreads both *Grayned* and the Oklahoma statute. *Grayned* does not stand for the proposition that federal courts are without

power to construe state statutes. The authority of the federal courts to make such constructions is well established. See e.g., *Concordia Insurance Co. v. School District,* 282 U.S. 545, 51 S.Ct. 275, 75 L.Ed. 528 (1931). See also, *New York v. Ferber, supra,* 458 U.S. at 767.

Grayned stands for the principle that federal courts cannot make strained interpretations of state statutes in order to save their constitutionality.

We would respectfully suggest that the reverse is also true. Federal courts should not make strained interpretations of state statutes to reach a finding of unconstitutional overbreadth. This is precisely what the Tenth Circuit has done.

The Tenth Circuit said:

> "Encouraging" and "promoting," like "advocating," do not necessarily imply incitement to imminent action. A teacher who went before the Oklahoma legislature or appeared on television to urge the repeal of the Oklahoma anti-sodomy statute would be "advocating," "promoting," and "encouraging," homosexual sodomy and creating a substantial risk that his or her speech would come to the attention of school children or school employees if he or she said, "I think it is psychologically damaging for people with homosexual desires to suppress those desires. They should act on those desires and should be legally free to do so." Such statements, which are aimed at legal and social change, are at the core of First Amendment protections.
>
> —729 F.2d at 1274.

The Tenth Circuit cites no legislative history, no actual examples, nor makes any logical analysis of the language

of the statute to reach its conclusion that the mere advocacy of a change in the law would *ipso facto* give rise to a teacher's dismissal. We would respectfully suggest that such examples are strained and are not mandated by the language of the statute.

When a person works in the legislative arena advocating a change in the law it cannot be said that the person is advocating that people engage in the activity which is the subject of the law. Legislators or lobbyists who advocate a change in the age of consent for the purposes of statutory rape are not necessarily advocating that people actually engage in sex with those who would fall outside the protection of the new law. People who advocate a change in the marijuana laws could do so because it has become so pervasive that it presents law enforcement difficulties. They are not necessarily advocating that people smoke marijuana.

In the same way, teachers in Oklahoma who advocate a change in the sodomy laws are not necessarily advocating that people engage in homosexualilty. Rather, they are advocating legal change, not sexual behavior. It is beyond question that the statute is aimed at teachers who directly advocate that homosexual sexual behavior should be practiced.

The Tenth Circuit goes out of its way to make a limiting construction upon the statutory "factors [to] be considered in making the determination whether the teacher . . . has been rendered unfit for his position." Okla. Stat. tit. 70, § 6-103.15 (C). The court said:

> The statute declares that a teacher may be fired under § 6-103.15 only if there is a finding of "unfitness" and lists factors that are to be considered in determining "unfitness": whether the activity

> or conduct is likely to adversely affect students or school employees; whether the activity or conduct is close in time or place to the teacher's student teacher's or teachers aide's official duties; whether any extenuating or aggravating circumstances exist; and whether the conduct or activity is of a repeated or continuing nature which tends to encourage or dispose school children toward similar conduct or activity. An adverse effect on students or other employees is the *only factor* among those listed in § 103.15 that is even related to a material and substantial disruption. [Emphasis added.]
>
> —729 F.2d at 1274-75.

This statutory construction is strained indeed to assert that "an adverse effect on students or other employees is the only factor . . . that is even related to a material and substantial disruption." If the teacher has engaged in advocacy of homosexual behavior ten years previously with no intervening incidents and in another area of the state, it is highly unlikely that such behavior would come to the attention of students. Accordingly, the criteria requiring consideration of the proximity of time and place to the teacher's official duties is indeed very important in reaching a determination of whether there has been a material and substantial disruption of the educational atmosphere.

Likewise the continuing nature of the conduct also can play an important role in evaluating the impact that a teacher's statements would have upon his students. Frequent statements are much more likely to create a material and substantial disruption in the school environment than an occasional or one-time statement.

Without any justification from the language of the

statute, the statutory history, or the clear legislative intent the Tenth Circuit has engaged in speculative interpretation of this law to reach its desired result in striking the statute for overbreadth.

In essence, this law only prohibits teachers from advocating violation of Oklahoma's criminal sodomy law. As the district court pointed out, this law does not allow teachers to be fired in the following circumstances:

a. a heterosexual or homosexual teacher who merely advocates equality for or tolerance of homosexuality;
b. a teacher who openly discusses homosexuality;
c. a teacher who assigns for class discussion study articles and books written by advocates of gay rights;
d. a teacher who expresses an opinion, publicly or privately on the subject of homosexuality;
e. a teacher who advocates the enactment of laws establishing civil rights for homosexuals. Appendix, Appellant's Jurisdictional Statement, Appendix 21b.

Also, it would seem that on its face, the law would not prohibit teachers from advocating repeal of Oklahoma's criminal sodomy statute. The law allows teachers to be fired for advocating that people break Oklahoma's criminal sodomy law.

We would respectfully suggest that the district court's reading of the statute was much more reasonable in its construction, and consistent with standards expressed in *Pickering*.

The Tenth Circuit's one-dimensional analysis fails to take into account the *Pickering* values, that a school may fire a teacher if the teacher's speech "materially and substantially" affects the operation of the school. (see *Tinker, supra*). The question put specifically, is, can advocacy of

criminal sodomy or homosexuality by a teacher disrupt the educational process of a classroom?

Several lower courts have upheld the decision of school districts to fire or transfer teachers out of the classroom, because they are homosexuals, and their homosexuality affected the efficiency of the educational process in the school.

One of the cases involved a teacher who was dismissed because he performed illegal homosexual acts in a restroom, *Moser v. State Bd. of Ed.*, 22 Cal.App.3d 988, 101 Cal.Rptr. 86 (1972). Both the trial court and the Tenth Circuit agreed that a teacher could be fired for violation of criminal laws against homosexuality.

In another California case, the California Supreme Court said a male teacher could not lose his teaching credentials for engaging in a "limited, noncriminal physical relationship" with another man for a period of one week, *Morrison v. State Bd. of Ed.*, 1 Cal.App.3d 214, 82 Cal.Rptr. 175, 461 P.2d 375 (1969). In footnote 4, 82 Cal. Rptr. at 177, of the opinion, the court said if the teacher had been convicted of criminal sodomy, or any other illegal homosexual activity, the State Board of Education would be required to revoke his teaching credentials.

Therefore, these two California cases agree with the Tenth Circuit, when it upheld the portion of the Oklahoma law that allows teachers to be fired for engaging in criminal sodomy:

> We see no constitutional problems in the statute's permitting a teacher to be fired for engaging in "public homosexual activity."
>
> —729 F.2d at 1273.

This is stating the obvious principle, that a teacher may be fired for breaking a criminal law, especially one involving moral turpitude, even though many people believe sodomy should not be against the law.

What of the homosexual teacher who is not convicted of criminal sodomy? Should he be fired merely for being a homosexual?

Three other cases allowed schools to fire or transfer teachers, not simply because they were homosexuals, but because they publicly revealed it, and it then became a disruptive element in the classroom. These three lower court decisions essentially agree with the language of the Oklahoma law, and *Pickering* and *Tinker*. A teacher can be fired if his homosexuality disrupts the classroom.

In *Acanafora v. Bd. of Ed. of Montgomery County*, 359 F.Supp. 843 (D. Md.1973) cert. den., 419 U.S. 836 (1974), the federal district court upheld the transfer of a homosexual teacher to a non-classroom setting, because he repeatedly went public in the media about his homosexuality and his problems with the school district. The court said:

> The question becomes whether the speech is likely to incite or produce imminent effects deleterious to the educational process. Such speech is not within the bounds of the "protectable," and the Board of Education is not precluded from taking reasonable action with respect to it.
>
> —359 F.Supp. at 856.

The Court said that instructing children is a special job, and that it places restrictions on a teacher's free speech rights. For example, the court said, a teacher could not discuss his sex life in front of the class.

The court in *Acanafora* upheld the transfer out of the classroom of the homosexual teacher for several reasons. The court said the Task Force of the National Institute of Mental Health had said that "prevention of homosexuality is a desireable goal." The court said the school board could remove the teacher from the classroom because

1. There is a cultural stigma against homosexuality

2. The notoriety of this specific case disrupts the educational process (the teacher had appeared on CBS's *60 Minutes,* and other television shows).

3. Experts disagree whether a homosexual teacher can act as a "passive role model" to influence young children to turn to homosexuality.

Collectively, the court said, these reasons are sufficient to transfer the teacher, because they are not "undifferentiated apprehension or fear of disturbance (quoting *Tinker*)." 359 F. Supp. at 855-856. It would seem from reading the opinion that the court was persuaded by the fact of the publicity this case had received. Again, the Oklahoma law requires this to be taken into consideration before any teacher is declared unfit to teach.

In *McConnell v. Anderson,* 451 F.2d 193 (8th Cir. 1971) the Eighth Circuit Court of Appeals upheld the action by the University of Minnesota Board of Regents not to hire a homosexual man to work at the library on the St. Paul campus. The court explained that before he had applied for the job, the homosexual had applied for a marriage license in Minneapolis with another homosexual man, and this situation had been widely covered by the media, and was the impetus of a lawsuit challenging the Minnesota law that grants marriage licenses only to heterosexual adult couples. The court agreed with the University of

Minnesota that the publicity surrounding the man's homosexuality made him unfit for employment:

> [This is] a case in which the applicant seeks employment on his own terms. . . the right to pursue an activist role in *implementing* his unconventional ideas concerning the societal status to be accorded homosexuals, and thereby, to foist tacit approval of this socially repugnant concept upon his employer, who is, in this instance, an institution of higher learning. [Emphasis in original.]
>
> —451 F.2d at 196.

Again, the court used an analysis essentially the same as the one in *Pickering* and *Tinker,* and also used in the Oklahoma statute. The court balanced the interests and weighed the factors, and found that the applicant's public advocacy of homosexuality would be disruptive to the educational processes at the University of Minnesota.

In the third case, *Gaylord v. Tacoma School District No. 10,* 88 Wn. 2nd 286, 559 P.2d 1340 (1977) cert. den. 434 U.S. 879 (1978), the Washington Supreme Court upheld the firing of a homosexual teacher who worked in a public high school.

In *Gaylord,* a public school teacher sought out homosexual friends, and told a student that he was a homosexual. The student told the school officials, who fired him for "immorality," partially due to the fact that Washington had a criminal sodomy law at that time. The teacher's behavior as a homosexual would have violated the criminal sodomy law, even though he had never been convicted under it. The Supreme Court of Washington spoke against blanket approval to fire homosexual teachers:

> "Immorality" must not be construed in its abstract sense apart from its effect upon teaching efficiency or fitness to teach.
>
> —559 P.2d at 1343.

The Washington Supreme Court evaluated the facts in light of this standard, and ruled that the homosexual teacher had lost his effectiveness as a teacher, because he had been seeking out homosexual friends, and the publicity of his situation had disrupted the educational process in the classroom.

The Oklahoma law, similarly, does not offer a blanket power to school officials to fire homosexual teachers, simply because they are homosexuals. The teacher's homosexuality must disrupt the educational process in the ways spelled out in the law before it is proper to declare the teacher unfit to teach under that statute.

Therefore, the Oklahoma statute is not overbroad, but is drafted consistent with the standards spelled out in *Pickering*, and with appropriate safeguards to ensure that teachers are not fired for exercising protected speech. The statute can be construed in a manner that is constitutional, which is what the federal district court did. Therefore, this Court should reverse the portion of the Tenth Circuit's

opinion that found a portion of the Oklahoma law unconstitutionally overbroad, and reinstate the federal district court opinion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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